

## **COMMON INTEREST, JOINT DEFENSE, AND CONFIDENTIALITY AGREEMENT AMONG PERMITTEES**

This Common Interest, Joint Defense, and Confidentiality Agreement (“Agreement”) effective on January 1, 2022 is entered into by and among San Bernardino County (“County”), the San Bernardino County Flood Control District (“District”), and the cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Rancho Cucamonga, Redlands, Rialto, San Bernardino, Upland, and Yucaipa (“Cities”) (collectively the “Parties” or individually a “Party”).

### **RECITALS**

A. The County, District, and Cities own and/or operate storm water and urban runoff conveyance systems, including flood control facilities, commonly referred to as municipal separate storm sewer systems or storm drains, through which storm water and urban runoff are discharged into waters of the United States that are located within the Santa Ana Region.

B. The District, as Permittee, and the Cities, as Co-Permittees (jointly “Permittees”), are subject to a National Pollutant Discharge Elimination System (“NPDES”) Permit and Waste Discharge Requirements, Order No. R8-2010-0036, NPDES No. CAS618036 (“Permit”).

C. The Santa Ana Regional Water Quality Control Board (“Regional Board”) issued the Permit on January 29, 2010 for a five-year term. The Permit designates the District as “Principal Permittee” under the Permit, and the District administers and coordinates many of the permit requirements on behalf of all the Permittees.

D. On June 28, 2011, the Parties entered into an Implementation Agreement to establish an integrated storm water management program (“Program”) that included development of a Management Committee to coordinate compliance, including establishing budgets, to set forth the duties of the Parties, to provide reimbursement to the District for administrative responsibilities, and to share costs to implement the Program. The Implementation Agreement, attached hereto as **Exhibit A**, sets forth the percentage of costs that each Party agreed to contribute to implement the Program. The term of the Implementation Agreement coincides with the term of the Permit and expires six months after the Final Permit, as defined below, is approved.

E. To renew the Permit, the Permittees submitted a Report of Waste Discharge for renewal on August 1, 2014.

F. Though the Regional Board has not yet issued a renewal of the Permit, the Permittees continue to implement and comply with the Permit.

G. The Parties believe that the Regional Board may be circulating a draft version of the new permit (“Draft Permit”) in approximately January 2022.

H. Each of the Parties has a shared common interest in proceedings related to the Draft Permit, including negotiating the terms of the Draft Permit with the Regional Board, participating in the administrative hearing to adopt the Draft Permit as the final permit (“Final Permit”), seeking administrative or judicial review of any terms in the Final Permit that warrant reconsideration, defending any adverse future claims or actions related to the Final Permit, and addressing any and all types of legal challenges to the Draft or Final Permit (jointly “Permit Proceedings”). Each of the

Parties intends to appear in administrative hearings as well as any potential future actions related to the Draft or Final Permit to represent the common interests of the Parties as well as each Party's own separate interests, some of which may be unique. Such representation of separate or unique interests is not inconsistent with the common interests of the Parties.

I. Nothing in this Agreement is meant or should be construed to affect a Party's legal obligation to exercise its independent judgment as required by law concerning the Permit Proceedings.

J. Without admitting any individual or shared liability, and expressly denying same, the Parties here assert that it will best serve their common interests to coordinate their efforts and share certain privileged and confidential information, in order to respond effectively to and negotiate with the Regional Board as well as to address and/or defend claims during the Permit Proceedings by the Regional Board or any parties that become adverse parties. Such coordination of effort and sharing of information is not intended to waive and shall not waive any privilege or protection otherwise applicable.

K. By this Agreement, the Parties seek to establish a common interest group with respect to the Permit Proceedings, preserving to the fullest extent possible all applicable legal and evidentiary privileges, including the protections of the attorney-client privilege, the work product doctrine, the joint defense/common interest privilege, and the deliberative process and official information privileges.

L. The Parties and their respective legal counsel are referred to herein as "the Common Interest Group."

M. The Parties intend for this Agreement to allow for the inclusion of additional members of the Common Interest Group with the consent of all Parties.

N. The Parties intend for the scope of this Agreement to include any later-filed related actions that raise or implicate similar interests of the Parties without the necessity of amending this Agreement.

### **TERMS AND CONDITIONS**

Therefore, in consideration of the mutual promises contained and incorporated in the above Recitals in this Agreement, the Parties agree as follows:

1. **Purpose.** It is the purpose of this Agreement to memorialize the Parties' intentions concerning the exchange of information during the Permit Proceedings, and to support a joint defense and/or common interest based upon the assertion by the Parties, or any Party, of the attorney-client privilege, work product doctrine, deliberative process and official information privileges, and any other privileges and protections that may apply to any Joint Defense Communications (as defined in Paragraph 3 below) that may be shared among members of the Common Interest Group. This Agreement addresses the flow, handling, security, and disclosure of documents, data, and oral and written information that are not produced pursuant to formal or informal discovery requests, and that may be exchanged by members of the Common Interest Group. It is the intention of the Parties that the exchange of Joint Defense Communications among the members of the Common Interest Group will not constitute a waiver of any privilege or protection, including without limitation the attorney-client privilege, the attorney work product

doctrine, and the deliberative process and official information privileges. The Parties agree that any consultation between the Parties or among their counsel, and any exchange of work product or other Joint Defense Communications are in reliance on the Parties' common interests, as described herein, and their intent to share information and cooperate in joint defense efforts without waiving any privilege or protection. In this regard, the Parties have agreed to provide reasonable cooperation in the execution of their respective duties under this Agreement. However, no obligation to share any documents, data or information is created by this Agreement.

2. Lawsuits. To the extent related to the Permit Proceedings, the Parties expressly state their intention to include in this Agreement any lawsuits related to adverse claims (other than a lawsuit by one Party or Parties against another Party or Parties), that have been or may be filed by or against any Party at any time during the pendency of this Agreement without the necessity of amending this Agreement.

3. Joint Defense Communications.

a. "Joint Defense Communication" means any documents, data, or information (including correspondence, reports, studies, memoranda of law and/or fact, factual material and summaries, mental impressions, transcripts, digests, and any other written material or oral information of any kind whatsoever) that relate to matters addressed by this Agreement that any Party receives from any other Party or its officers, partners, employees, agents, consultants, attorneys, representatives, or experts that would otherwise be protected from disclosure to third parties pursuant to applicable legal and evidentiary privileges, including the attorney-client privilege, work product doctrine, and/or the deliberative process and official information privileges. The Parties intend that all Joint Defense Communications shall remain privileged or protected when communicated to any other Party or its elected officials, officers, partners, employees, agents, consultants, attorneys, representatives, or experts in accordance with the common purpose concepts in California Evidence Code § 912(d) and articulated in *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, and *Continental Oil Co. v. United States* (9th Cir. 1964) 330 F.2d 347, and their progeny. Each of the Parties and counsel agree that all Joint Defense Communications they receive from any Party or its representative shall be treated and maintained by the receiving Party as privileged and confidential, and not disclosed to third parties, except as provided in this Agreement.

b. Joint Defense Communications may be disclosed or transferred between any or all of the Parties orally or in writing and by any other appropriate means of communication. The Parties agree that all Joint Defense Communications shared pursuant to this Agreement shall be held in strict confidence by the Parties and by all persons to whom the Joint Defense Communications are disclosed and shall not be disseminated outside the Common Interest Group. All Joint Defense Communications received from Parties pursuant to this Agreement are subject to the joint defense and common interest privileges or protections and must be held in strict confidence by the receiving party and its counsel. The receiving party may disclose Joint Defense Communications only to its counsel, authorized representatives, and those of its board members, councilmembers, supervisors, directors, officers, employees, agents, independent contractors, consultants and retained experts who have a need to know. Each Party agrees that its independent contractors will agree to keep all Joint Defense Communications confidential in accordance with the terms of this Agreement before any Joint Defense Communications is provided to them. If a Party intends to disclose a Joint Defense

Communication only to certain members of the Common Interest Group, the disclosing Party shall specify the members who are entitled to review or receive that information or document. All Parties agree that they will not share or disclose such Joint Defense Communications to any Party or person who is not designated by the disclosing Party.

c. A Joint Defense Communication that is exchanged in written or document form and that is intended to be confidential shall be marked "Confidential: Privileged Communication" or with a similar heading indicating confidentiality. To the extent possible, the header or footer should further list all other privileges and protections that may be applicable to the particular Joint Defense Communication, including the attorney-client privilege, work product doctrine, and/or the deliberative process and official information privileges. However, failure to mark or identify a Joint Defense Communication as "Confidential: Privileged Communication" or a similar heading shall not constitute a waiver of any applicable legal or evidentiary privilege or protection that may apply.

d. Waiver of the joint defense and common interest privileges or protections are effective only when all Parties unanimously agree to the waiver. Any Party (the "Disclosing Party") may, without permission from the other Parties, use, for the Disclosing Party's own purposes, any information that the Disclosing Party disclosed to and shared pursuant to this Agreement.

e. Any Party who receives Joint Defense Communications shall not disclose such Joint Defense Communications or the information imparted thereby to any other third party without the express prior written consent of the other Parties. Any unauthorized disclosure of any Joint Defense Communication to any third party shall not constitute a waiver of any applicable privilege or protection. However, no provision in this Agreement shall be construed to limit the right of any Party to disclose any documents or information that such Party obtained through means other than a Joint Defense Communication.

f. Although documents and information that are not otherwise privileged will not gain the protection of any privilege by virtue of being a part of a Joint Defense Communication, each Party shall treat the information as privileged and confidential and shall not disclose to third parties the fact that any particular document or information was shared through a Joint Defense Communication.

4. Permitted Use of Joint Defense Communications. All of the Parties acknowledge and agree that cooperation in the shared purposes and objectives necessarily involves the communication and sharing of confidential information and further agree that their interests are not currently adverse with regard to the subject of this Agreement. They further agree that all Joint Defense Communications received from any other Party shall be used exclusively in connection with the Permit Proceedings. Joint Defense Communications shall not be used or be admissible in any phase of any pre-litigation or litigation involving cross-claims or claims for contribution or indemnity between or among any of the Parties if such claims arise from or relate to adverse claims.

5. Permitted Disclosures. In the event that any Party receives a third-party request or demand for Joint Defense Communications received pursuant to this Agreement, by California Public Records Act ("CPRA") request, subpoena, request for production or otherwise, the Party receiving such request or demand shall, prior to making such disclosure: (a) notify the Parties

pursuant to the notice provision herein; and (b) assert and exercise diligence in supporting the joint defense and/or common interest doctrines and preserve any and all potentially applicable privileges or other protections from disclosure of the Joint Defense Communications, unless such privileges and protections have been knowingly waived by the Parties or Party who provided the Joint Defense Communications. Each Party shall take reasonable steps necessary to permit the assertion of all applicable rights and privileges with respect to any Joint Defense Communication and shall cooperate fully with all other Parties in any judicial proceeding relating to the disclosure of any Joint Defense Communications. However, the Parties understand and acknowledge that all Parties can still comply with their legal obligations under the CPRA and other document production statutes, if any, without breaching this Agreement, and no Party is required to seek a protective order or otherwise incur legal expense in efforts to oppose such a disclosure of a Joint Defense Communication.

6. Injunction to Prevent Improper Disclosure. The Parties agree that the unauthorized or improper disclosure of Joint Defense Communications to third parties not covered by this Agreement will result in irreparable harm to the Parties. In the event a Party or former Party believes that another Party or former Party is preparing to disclose Joint Defense Communications to third parties not covered by this Agreement, the Party or former Party objecting to such disclosure may seek an injunction to prevent the disclosure of such Joint Defense Communications. Each Party represents and warrants that it will not, in the future, assert that such an injunction is not necessary on the grounds that there is an adequate remedy at law.

7. Joint Consultants or Experts. The Parties agree that if a consultant or expert is jointly hired by the Common Interest Group, or retained by an individual Party for a matter on which a common interest exists with respect to the Permit Proceedings, that consultant or expert is covered by the joint defense and/or common interest doctrines and that privileges or protections applicable to the consultant or expert's work product or to any Party's communications with the consultant or expert shall not be waived by sharing such work product or communications with other Parties to this Agreement. The Parties agree not to seek disqualification of consultants or experts engaged by any other Party or Parties in connection with any future action based solely on the exchange of information pursuant to this Agreement.

8. Good Faith. Each Party agrees to exercise good faith and diligence to implement this Agreement and to maintain the confidentiality of discussions and exchanged Joint Defense Communications consistent with the purposes of this Agreement and the intent of the Party providing the information.

9. Independent Efforts. Nothing in this Agreement shall be construed to restrict the right of a Party to undertake separate investigative efforts or legal research in the defense of any action relating to the Permit Proceedings or any adverse claims related to them. Any Party undertaking such separate efforts shall be free to disclose or use the results of the separate and independent efforts in any manner that Party desires, without the consent of the Parties or any other Party.

10. Withdrawal or Settlement. Any Party may withdraw from this Agreement by delivering written notice to all other Parties, in accordance with Section 13 of this Agreement. Alternatively, one or more Parties may conclude their involvement in the Permit Proceedings by

reason of settlement or otherwise. Any voluntary withdrawal or settlement does not relieve any Party's obligation to continue to protect the confidentiality of all Joint Defense Communications, as though all Parties were still active in the Permit Proceedings. Such withdrawal or settlement shall be effective on the date that notice is deemed delivered to all Parties under the notice provision herein. Any Party withdrawing from this Agreement shall no longer have any right of access to any Joint Defense Communications after the date of withdrawal. The withdrawing Party shall either return or destroy all copies of Joint Defense Communications in its possession and shall certify in writing that all such materials have been returned or destroyed, as may be the case. All obligations under this Agreement shall continue to apply to the withdrawing and remaining Parties with respect to any Joint Defense Communications made to or by the withdrawing Parties prior to withdrawal.

11. Termination. This Agreement shall terminate upon the earlier of the following occurrences: (a) conclusion of all Permit Proceedings evidenced by a final judgment or settlement of administrative or judicial actions related to the Final Permit; (b) upon unanimous written consent to terminate among all then-current Parties; or (c) withdrawal from this Agreement by all of the Parties.

12. Survival of Obligations. Each Party agrees that all obligations herein, including the obligation to protect the confidentiality of Joint Defense Communications under this Agreement, shall survive the withdrawal from or termination of this Agreement, by settlement or otherwise, and shall remain binding on all Parties notwithstanding their withdrawal or the Agreement's termination, even if the interests of the Parties later become adverse, and regardless of whether the joint defense and/or common interest doctrines become inapplicable with respect to later communications between the Parties.

13. Notices. Except for changes in contact information, all notices under this Agreement must be in writing and must be sent by e-mail to the addresses set forth in Appendix A or hand-delivered or sent by registered or certified mail, postage pre-paid, return receipt requested, or by FEDEX or other nationally recognized overnight delivery service to each Party. Any notice shall be deemed delivered five (5) business days after such mailing date, except that any notice hand-delivered or sent by e-mail or overnight delivery shall be deemed delivered one (1) business day after the dispatch date for overnight delivery service. Notices shall be addressed to each Party at the addresses shown for them in Appendix A, with a copy to its respective counsel of record. Should the contact information for any Party change, then the Party shall provide written notification to all other Parties, either by e-mail or U.S. Mail within thirty (30) days of the change.

14. Engagement. Each Party agrees that it will not move to disqualify counsel from accepting future engagements unrelated to Permit Proceedings based solely upon counsel's receipt of Joint Defense Communication. The Parties agree they will not seek to disqualify counsel from examining or cross-examining any Party who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Joint Defense Agreement; and that such attorney may use any Joint Defense Communications provided by such Party while the Party was participating in this Agreement, but only consistent with the provisions of this Agreement. Each undersigned counsel to this Agreement represents that he or she has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

15. Entire Agreement. This Agreement sets forth the entire agreement of the Parties with respect to the subject matter contained herein, and no other terms are binding on the Parties.

16. Modifications. Any modification to this Agreement must be in writing and signed by all of the then-current Parties. This Section does not apply to changes in a Party's contact information.

17. Remedies. The Parties expressly acknowledge and agree that no adequate remedy is available at law for a breach of this Agreement and that in addition to any other remedies available, performance of this Agreement may be specifically ordered and/or a breach hereof may be enjoined, or both.

18. No Admission of Liability or Responsibility. No recital, term, and/or provision in this Agreement shall be construed as an admission of liability or responsibility relating to the adverse claims by any Party.

19. Additional Parties. Additional parties and their counsel may be added to the Common Interest Group with prior written acceptance of such addition by all Parties, which may be provided by e-mail from counsel for the Parties. The addition of a new Party is effected by completion of the "Additional Party Signature Page," attached hereto, and delivery of the completed signature page to all other Parties.

20. No Relationships Created. Nothing in this Agreement shall be construed to (a) create an attorney-client relationship between any Party and/or counsel to any other Party; (b) create any agency relationship among the Parties and/or their counsel, including a joint venture or partnership; or (c) affect the separate and independent representation of each Party by its respective counsel according to what each such counsel believes to be in the client's best interests. Each Party is responsible for directing its respective counsel and, to the extent the research or work product of any Party's counsel is disclosed to other Parties in furtherance of the Parties' common interest, such disclosure shall not waive any privileges or protections that apply to the work product, and shall not entitle any Party to move to disqualify the other Party's counsel due to the performance of such work or because of information obtained in the course of such work.

21. Reservation of Rights and Claims. Notwithstanding any provision of this Agreement, each Party reserves all claims, causes of action, and any and all other rights it has or may have against any other Party, and the Parties do not intend or expect this Agreement to release or to waive those claims or rights.

22. Attorney's Fees. Except by separate agreement, including but not limited to the Implementation Agreement, each Party shall be responsible for its own attorney's fees related to this Agreement, any actions required under this Agreement, and actions during or related to the Permit Proceedings.

23. No Compensation. Except by separate agreement, including but not limited to the Implementation Agreement, no Party shall be entitled to any compensation, reimbursement or contribution from any other Party for the participation of its employees, officers, agents, or counsel in the Permit Proceedings.

24. Jointly Drafted. The Parties agree that this Agreement was jointly drafted by each Party, and no inference or rule of construction shall be applied based on the assumption that any individual Party drafted any provision in this Agreement.

25. Counterparts and Signatures. The Parties agree that Agreement may be executed in counterparts, each of which shall be deemed to be an original, but both of which together shall constitute one and the same instrument, and that a photocopy or facsimile may serve as an original. If this Agreement is executed in counterparts, no signatory hereto shall be bound until both the parties have fully executed a counterpart of this Agreement. The Parties shall be entitled to sign and transmit an electronic signature of this Agreement (whether by facsimile, PDF, or other email transmission), which signature shall be binding on the party whose name is contained therein. Each Party providing an electronic signature agrees to promptly execute and deliver to the other party an original signed Agreement upon request.

26. Severability. If any provision in this Agreement is deemed invalid or unenforceable, the balance of this Agreement shall remain effective and shall be enforced to the full extent permitted by law.

27. Authority. The undersigned individuals represent that they are authorized to execute this Agreement on behalf of their respective Parties.

28. Choice of Law. This Agreement will be interpreted in accordance with the laws of the State of California without regard to principles of conflicts of law; venue shall be San Bernardino County.

WHEREFORE, the Parties below have executed and entered into this Agreement as of the date indicated and within the jurisdiction noted.

**SAN BERNARDINO COUNTY AND  
SAN BERNARDINO COUNTY FLOOD  
CONTROL DISTRICT**

\_\_\_\_\_  
Tom Bunton  
County Counsel  
San Bernardino County and  
San Bernardino County Flood Control District

Date: \_\_\_\_\_



**CITY OF BIG BEAR LAKE**

*Attest:*

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
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By: \_\_\_\_\_  
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**CITY OF CHINO**

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**CITY OF CHINO HILLS**

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**CITY OF COLTON**

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**CITY OF FONTANA**

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**CITY OF GRAND TERRACE**

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**CITY OF HIGHLAND**

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**CITY OF LOMA LINDA**

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**CITY OF MONTCLAIR**

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**CITY OF ONTARIO**

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**CITY OF RANCHO CUCAMONGA**

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**CITY OF REDLANDS**

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**CITY OF RIALTO**

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**CITY OF SAN BERNARDINO**

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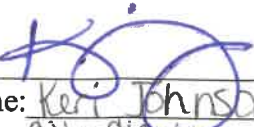
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**CITY OF UPLAND**

By:   
Name: Michael Blay  
Title: City Manager  
Date: \_\_\_\_\_

*Attest:*

By:   
Name: Keri Johnson  
Title: City Clerk  
Date: \_\_\_\_\_

*Approved as to Legal Form:*

By:   
Name: Stephen P. Deitsch  
Title: City Attorney  
Date: 3/14/22

**CITY OF YUCAIPA**

*Attest:*

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## **ADDITIONAL PARTY SIGNATURE PAGE**

WHEREFORE, the Party below has executed and entered into this Common Interest, Joint Defense, and Confidentiality Agreement as of the date indicated.

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**APPENDIX A:  
PARTY CONTACT INFORMATION**

Name and Address of Party and Counsel	Telephone and Facsimile
<b>San Bernardino County</b> Jonathan Dillon, <a href="mailto:Jonathan.Dillon@dpw.sbcounty.gov">Jonathan.Dillon@dpw.sbcounty.gov</a> Elias Severo, <a href="mailto:esevero@dpw.sbcounty.gov">esevero@dpw.sbcounty.gov</a> 825 East Third Street San Bernardino, CA 92415	(909) 387-8109 (909) 387-8109 (909) 387-0305 facsimile
<b>San Bernardino County Flood Control District</b> Arlene B. Chun, <a href="mailto:Arlene.Chun@dpw.sbcounty.gov">Arlene.Chun@dpw.sbcounty.gov</a> Anthony Pham, <a href="mailto:Anthony.Pham@dpw.sbcounty.gov">Anthony.Pham@dpw.sbcounty.gov</a> Chris Bland, <a href="mailto:Christopher.Bland@dpw.sbcounty.gov">Christopher.Bland@dpw.sbcounty.gov</a> 825 East Third Street San Bernardino, CA 92415	(909) 387-8109 (909) 387-8109 (909) 387-8109 (909) 387-0305 facsimile
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